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QUESTIONS PRESENTED

Through the Social Security Act, 42 U.S.C. § 301 *et seq.*, each State receives substantial federal funding for child welfare services on the condition that it have a plan "in effect in all subdivisions of the State," 42 U.S.C. § 671(a)(3), which:

> provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

Id. at § 671(a)(15). The questions presented in this case are:

1. Whether, under 42 U.S.C. § 1983, federal courts are competent to determine that the State of Illinois has no plan in effect to make the "reasonable efforts" required by 42 U.S.C. § 671(a)(15), when Illinois has systematically failed to provide children with caseworkers, who are necessary for the State to make *any* efforts to maintain or reunite them with their families; and

2. Whether the State of Illinois may disregard Congress' decision to condition federal funding under 42 U.S.C. §§ 670-676 and companion provisions of the Social Security Act on the State's making reasonable efforts to keep children out of foster care, when Illinois is eligible for and has voluntarily accepted substantial funding under these provisions to provide services to keep families together.

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BRIEF OF RESPONDENTS

STATUTES INVOLVED

1. The Adoption Assistance and Child Welfare Act of 1980, 94 Stat. 500, 42 U.S.C. §§ 620-628, 670-679a (codified as Title IV-B and Title IV-E of the Social Security Act), states in pertinent part:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—
>
> * * * *
>
> (3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; [and]
>
> * * * *
>
> (15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home. . . .

42 U.S.C. § 671(a)(3), (15).

2. 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

I. Introduction

Plaintiffs Artist M., Sarah B., Claude F., Algienan G., Myron C., Willie M., Amber B., and the class they represent are abused and neglected children who have been placed under the care or supervision of the Illinois Department of Children and Family Services (DCFS). Plaintiffs here challenge DCFS's systemic failure to meet its obligation to have a plan in effect to provide reasonable efforts to preserve or reunite them with their families, as required under the Adoption Assistance and Child Welfare Act of 1980, 94 Stat. 500, 42 U.S.C. §§ 620-628, 670-679a (the AACWA or the Act).

Through the AACWA, Congress created two federal-state cooperative programs, codified as Title IV-B and Title IV-E of the Social Security Act, which, along with Title IV-A, 42 U.S.C. §§ 601-617, provide extensive federal funding to participating States for the improvement of their child welfare systems. The AACWA was enacted:

> to require States to make critically needed improvements in their foster care programs [and] . . . to provide children and families with improved protection against unwarranted removal of children from their homes and added protection against inappropriate and unnecessarily prolonged foster care placement.

H.R. Rep. No. 136, 96th Cong., 1st Sess. 46 (1979).

The primary requirements of Title IV-E are contained in 42 U.S.C. § 671, which states in part:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them . . . [and which] provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home. . . .

42 U.S.C. § 671(a)(3), (15). States must also comply with this requirement in order to receive federal funding under Title IV-A. 42 U.S.C. § 602(a)(20).

Congress' mandate that participating States make reasonable efforts to preserve and reunite families is at the heart of the AACWA. For example, the AACWA requires a State court to determine whether the participating State has made reasonable efforts of the type described in § 671(a)(15) whenever the State seeks to remove a child from his or her home. 42 U.S.C. § 672(a)(1). In addition, 42 U.S.C. § 671(a)(16) requires the State to provide a case plan for each child in its care, describing the:

> services [to be] provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, [and] facilitate return of the child to his own home or the permanent placement of the child.

42 U.S.C. § 675(1)(B). The case plan must also describe the State's efforts prior to that time to preserve or reunite the family. 45 C.F.R. § 1356.21(d)(4). Each case plan must then be reviewed periodically in order to assess the progress toward remedying the conditions which led to the child's removal from his or her family and to consider the prospects for the child's return. 42 U.S.C. § 675(5)(B). Finally, under 42 U.S.C. § 671(b), the Secretary of Health and Human Services (the Secretary) is required to suspend or reduce Title IV-E payments to any State that substantially fails to implement a plan to make reasonable efforts. *See also* 42 U.S.C. § 604(a) (similarly requiring suspension or reduction in Title IV-A payments).

As a participating State in Title IV-E and Title IV-A, Illinois must meet each of Title IV-E's requirements. To comply with the reasonable efforts requirements in § 671(a)(15), DCFS has designed a system which requires the assignment of a caseworker to each child. The caseworker must secure services to preserve the family, if it

is safe for the child to remain at home, or to reunify the family, if the child has been removed.

Defendants, however, fail to comply with the Act's mandate. The District Court found that they systematically fail to promptly assign caseworkers to plaintiffs and their families. As a result, defendants have no plan in effect to make reasonable efforts to maintain or to reunite children with their families, leaving the children at risk of further abuse or neglect and subjecting them to needless and unnecessarily long placements in foster care.

In order to vindicate their rights, plaintiffs brought this action, grounded in § 1983 and the Act itself. After a hearing on plaintiffs' motion for a preliminary injunction, defendants moved to dismiss the complaint. The District Court denied defendants' motion in part and ultimately entered a preliminary injunction. The Court of Appeals for the Seventh Circuit affirmed. This Court granted certiorari on May 13, 1991.

II. DCFS's Caseworker Assignment Policies and Practices

A. *The Vital Role of the Caseworker*

Plaintiffs are children who have been abused or neglected by their parents or whose parents are temporarily unable to care for them. J.A. 6, ¶ 3. In each of their cases, DCFS files a petition for adjudication of wardship in the Circuit Court of Cook County, Illinois, County Department, Juvenile Division ("Juvenile Court"). J.A. 33-34, ¶ 1. Based in part on the recommendations of investigators from the DCFS Division of Child Protection ("DCP"), the Juvenile Court then places many of these children in DCFS's custody. J.A. 34, ¶ 3. In nearly all of the remaining cases, the Juvenile Court orders DCFS to supervise the children in the custody of their parents ("protective order cases"). *Id.*

Defendants have assigned a very limited role to DCP investigators. They provide no family preservation, family reunification, or other services to children and their families. They only investigate reports of abuse and neglect. J.A. 34, ¶ 2. Instead, DCFS uses caseworkers—purport-

edly assigning a caseworker to every child—to fulfill its obligations to make reasonable efforts. Thus, when DCFS assumes custody of a child, it requires the caseworker first to find the child a safe temporary home—preferably with relatives—where reunification efforts can begin. J.A. 35, ¶ 4. The caseworker is then responsible for arranging visits with the child's parents and other members of the family, providing for counseling and other necessary services, and helping protect the child from further harm. *Id.* The caseworker must also prepare the written, individualized case plan required by the Act and to report on the condition of the child and the family to the Juvenile Court. *Id.* *See also* 89 Ill. Admin. Code § 305.11(a)(1).

Similarly, in protective order cases, defendants assign caseworkers the responsibility of securing services to help keep the family together. J.A. 36, ¶ 6. Thus, while the child remains at home, DCFS requires the caseworker to procure individual or family counseling, arrange homemaker services, provide substance abuse treatment, and in general, help the family provide for the needs of the child. *Id.* Perhaps most importantly, caseworkers are also responsible for monitoring the well-being of children to determine whether it is safe for them to remain at home. *Id.*

In both types of cases, it is crucial for defendants to assign caseworkers promptly. J.A. 37-38, ¶ 10. Because parents are most motivated to change during times of crisis, immediate intervention to preserve families is essential. *Id.* In custody cases, the likelihood that children will be reunited with their families is greatly increased when services are provided quickly. *Id.* The longer DCFS delays in providing such services during this critical period, the more likely it is that children will never be able to return home. *Id.* Similarly, DCFS's failure to provide prompt family preservation services quickly places children who remain at home at risk and often results in their unnecessary removal from their parents' custody. J.A. 38, ¶ 12. In short, under the system which defend-

ants designed, the State cannot fulfill the Act's reasonable efforts requirement without promptly assigning caseworkers.

B. *Defendants' Caseworker Assignment Practices at the Outset of this Case*

At the time plaintiffs filed their complaint, defendants regularly failed to assign caseworkers capable of initiating child welfare services for them and their families, both in protective order and custody cases. J.A. 39, ¶ 13. Defendants did not assign a caseworker to most children until at least two weeks after the first Juvenile Court date. *Id.* For many others they failed to assign a caseworker at all during the first 30 to 45 days. *Id.* In some cases children were without a caseworker for several months. J.A. 40, ¶ 17.

Moreover, in many cases when defendants finally assigned a caseworker, that assignment lasted only a short time. J.A. 39-40, ¶ 15. In other cases the assignments ended abruptly when defendants transferred or terminated caseworkers or when caseworkers took leaves of absence or resigned. J.A. 40, ¶ 16. In these cases DCFS simply failed to reassign a caseworker, leaving children without family reunification and family preservation services for months at a time. J.A. 39-40, ¶¶ 15-16.

By not assigning caseworkers, defendants provided no services to these abused and neglected children or their families. J.A. 37, ¶ 9. Young children removed from home were denied visits with their parents and siblings. *Id.* Other children were left in inappropriate placements such as shelters, even when appropriate relatives were willing to care for them. *Id.* Without a caseworker, many children were denied essential sex abuse treatment, grief counseling and psychiatric care. Still others remained in DCFS's custody indefinitely without any plan for their future. *Id.* Finally, without a caseworker to provide information, the Juvenile Court could not even contemplate returning these children home. *See* Ill. Rev. Stat. ch. 37, ¶¶ 802-10(2), 802-22, 802-23(1)(a), 802-28(3).

Likewise, children who remained at home under a court order requiring DCFS supervision were denied family preservation services and monitoring to ensure their safety when no caseworker was assigned. J.A. 38, ¶ 11. Without caseworkers, children who came under DCFS's supervision because their parents failed to provide adequate food continued to go hungry. *Id.* Parents who were willing to comply with a court order to obtain drug treatment received no assistance in locating and enrolling in a treatment program. *Id.* When no caseworker was assigned to visit the home, children were further abused and ultimately had to be removed from the custody of their parents. *Id.*

Despite their awareness of these problems, defendants did nothing to expedite the assignment of caseworkers to fulfill DCFS's obligation under the AACWA to make reasonable efforts to keep families together. J.A. 41, ¶ 18. Defendants simply failed to require DCFS personnel to assign cases promptly. *Id.* Defendants also failed to develop a policy or procedure for reassigning cases when caseworkers resign, transfer, or are absent for substantial periods of time. J.A. 41, ¶ 19. In fact, DCFS deliberately decided not to reassign many such cases. *Id.*

III. Proceedings in the Courts Below

On December 14, 1988, plaintiffs filed their complaint in the United States District Court for the Northern District of Illinois, alleging that defendants' failure to assign caseworkers to them promptly violated their rights, and those of similarly situated children, under the Act. J.A. 5-27. Plaintiffs sought declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983 and through an implied cause of action under the Act. *Id.* A subclass of plaintiffs—those in DCFS's custody—also asserted that their rights under the Due Process Clause of the United States Constitution had been violated. *Id.* On the day they filed suit, plaintiffs also filed motions for class certification and for a preliminary injunction. R. 5, 7. The District Court exercised jurisdiction over the case pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

After granting the motion for class certification and expediting discovery, in January 1989, the District Court conducted a three day hearing on plaintiffs' motion for a preliminary injunction. Pet. App. 52a. The evidence revealed systemic problems in caseworker assignment, as described above, which resulted in the wholesale violation of plaintiffs' rights under the Act. *Id.* Plaintiffs also showed the harm suffered by individual children who were entrusted to DCFS's care and supervision. *Id.* In response, defendants' witnesses described their plan to reorganize the Department, purportedly to ensure prompt caseworker assignment. Pet. App. 34a, n.2.

The District Court initially accepted defendants' assurances that the reorganization plan would solve DCFS's caseworker assignment problems and deferred ruling on plaintiffs' motion for a preliminary injunction for well over a year. Pet. App. 52a. As time passed, however, it became apparent that the District Court's faith in defendants' plan had been misplaced. First, defendants continued to delay the assignment of caseworkers at the outset of cases on a regular basis. J.A. 43-44, ¶¶ 21-25. Second, defendants' heralded reorganization plan failed to address the gaps created when caseworkers resigned, transferred, were fired or took leaves of absence. J.A. 44-45, ¶ 26. Those reassignments which did occur were often illusory, as defendants regularly reassigned children's cases *en masse* to a single caseworker who, given the nature and volume of the reassignments, was not able to provide services to those children and their families. J.A. 45, ¶ 27. Finally, even after implementation of their plan, defendants failed to hold anyone in the agency accountable for assigning a caseworker promptly. J.A. 45-46, ¶¶ 28-29. Thus, despite the reorganization, defendants continued to deprive children and their families of caseworkers and the services and protections which, under DCFS's system, only the caseworkers could provide.

In the face of these problems, defendants filed a motion to dismiss the complaint. R. 53. On November 21, 1989, the District Court granted the motion only as it related

to plaintiffs' constitutional claims. Pet. App. 50a. The District Court denied the motion in all other respects, holding that plaintiffs had stated a cause of action under the AACWA—both through an implied cause of action and under § 1983. Pet. App. 35a-44a. Nevertheless, the District Court continued to defer to defendants' reorganization plan and invited them to apprise the court of any progress in its implementation. Pet. App. 50a.

Defendants, however, made no progress. They continued to deprive children of caseworkers for extended periods of time through the beginning of 1990. J.A. 46-48, ¶¶ 30-36. Finally, the District Court concluded that the reorganization plan had failed to bring defendants into compliance with the AACWA. Based on evidence it had received over the previous 14 months, on March 2, 1990, the Court entered a preliminary injunction, prohibiting defendants from:

> (a) failing to assign a caseworker capable of providing child welfare services to each of the plaintiffs and their families within three working days of the time that plaintiffs['] cases are first heard in Juvenile Court; and
>
> (b) failing to assign a caseworker capable of delivering child welfare services within three working days of the time that a previously assigned caseworker relinquishes responsibility for any portion of a case.

Pet. App. 56a. In issuing this injunction, the District Court preserved the central role of the caseworker in DCFS's plan and used the time frames which DCFS itself had established for caseworker assignment. J.A. 48, ¶ 37. Defendants then appealed.

The Court of Appeals for the Seventh Circuit affirmed the District Court in an opinion entered on October 29, 1990. The Court first held that plaintiffs could enforce the AACWA, both through an implied cause of action under the Act and under § 1983. Pet. App. 6a-18a. It then ruled that § 671(a)(15) required DCFS to make reasonable efforts on behalf of children who remain at home under court supervision. Pet. App. 18a. Finally,

the Court upheld the injunction as fully supported by the evidence. Pet. App. 18a-20a. On December 20, 1990, the Court of Appeals denied defendants' petition for rehearing. R. 138.

SUMMARY OF THE ARGUMENT

In order to receive federal funding under Title IV-E or Title IV-A, Illinois must develop and implement a plan which:

> provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

42 U.S.C. § 671(a)(15). *See also id.* at § 602(a)(20). The test for determining whether this provision creates a right enforceable under § 1983 is well established:

> [The] inquiry turns on whether the provision in question was intended to benefit the putative plaintiff. If so, the provision creates an enforceable right unless it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit, or unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.

Wilder v. Virginia Hospital Association, 110 S. Ct. 2510, 2517 (1990) (internal quotations and citations omitted); *see also Dennis v. Higgins*, 111 S. Ct. 865, 871-72 (1991); *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448 (1989).

The AACWA's requirement that States implement a plan to make reasonable efforts to preserve and reunite families meets each of these tests. Congress intended to benefit children like the plaintiffs through this provision and clearly imposed a binding obligation on the States to make reasonable efforts. Defendants do not dispute either of these facts. But in an effort to frustrate Congress' in-

tent to protect these children and to escape their clear-cut duty, defendants argue that the federal courts are incompetent to enforce the AACWA. Defendants' argument is meritless.

The reasonable efforts requirement is sufficiently specific to be judicially enforceable, a conclusion compelled by *Wilder* and by *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987). As the District Court demonstrated here, a federal court can readily determine that defendants systematically fail to assign caseworkers. Without caseworkers, defendants make no efforts, let alone reasonable ones, to preserve and reunify plaintiffs' families. Consequently, the court could only conclude that defendants have violated their obligations under the AACWA. In nearly 200 pages of briefs, defendants and amici supporting them utterly fail to show how the supposedly vague and amorphous reasonable efforts clause can be construed in any other way here.

Federal courts are fully accustomed to enforcing reasonableness requirements, and federal regulations and state court cases buttress their ability to do so here. They also provide whatever benchmark may be necessary under *Wilder* to enforce § 671(a)(15) in other cases. Finally, neither 42 U.S.C. § 671(b) nor § 672(a)(1) creates a sufficiently comprehensive remedial mechanism to preclude enforcement of the reasonable efforts requirement under § 1983. *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981). Accordingly, under the reasoning in *Dennis*, *Wilder* and *Golden State*, plaintiffs may enforce the reasonable efforts requirement through § 1983.

Likewise, the courts below correctly applied the analysis in *Cort v. Ash*, 422 U.S. 66 (1975), to conclude that a private right of action exists directly under the Act. Legislative intent is the most important factor in the analysis, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979), and it is clear from the legislative history here that Congress intended to create a private remedy under the AACWA.

Children who remain at home are equally entitled to enforce the reasonable efforts requirement. Illinois, like other participating States, receives substantial funding under Title IV-E, Title IV-A, and other provisions of the Social Security Act, which it uses to provide child welfare services to all abused and neglected children, including those who remain with their families under the court-ordered supervision of DCFS. By the plain language of § 671(a)(15), Congress made it abundantly clear that participating States must make reasonable efforts to keep children at home.

Finally, defendants' "floodgates" argument provides no legal or rational basis for this Court to ignore the plainly expressed intent of Congress. Defendants contend that enforcement of § 671(a)(15) will improperly burden the federal courts, both by increasing the number of cases under the AACWA and by requiring federal courts to adjudicate cases which defendants prefer to leave to state court judges. These concerns are contrived, as the flood of litigation simply has not materialized in the eleven years since the Act was passed, nor is it likely to commence now. Moreover, the deferential standard of review required under *Wilder*, 110 S. Ct. at 2523 n.18, provides ample protection to the States against that possibility and leaves States substantial discretion, consistent with Congress' intent, to develop child welfare programs to meet their needs, the needs of their citizens, and the requirements of the Act. Procedural hurdles, such as collateral estoppel and abstention, will also regularly preclude individual children or families from challenging decisions made in individual cases.

Congress never intended to permit States to accept federal funding while disregarding the Act's mandate, as Illinois seeks to do here. Congress made the reasonable efforts requirement the touchstone of the Act. Consequently, federal courts must remain open to vindicate the rights of abused and neglected children to reasonable efforts to keep their families together.

ARGUMENT

I. THROUGH § 1983, PLAINTIFFS MAY ENFORCE THE AACWA'S REQUIREMENT THAT STATES MAKE REASONABLE EFFORTS TO PREVENT OR ELIMINATE THE NEED TO REMOVE CHILDREN FROM THEIR HOMES AND TO MAKE IT POSSIBLE FOR THEM TO RETURN TO THEIR FAMILIES.

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court held that § 1983 provides a remedy for the violation of federal statutes. Since that time, this Court has crafted only two exceptions to the broad scope of § 1983:

> A plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless "(1) the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983," or (2) "Congress has foreclosed such enforcement of the statute in the enactment itself."

Wilder, 110 S. Ct. at 2517, *quoting Wright*, 479 U.S. at 423; *see also Golden State*, 110 S. Ct. at 448 (1989). Neither of these exceptions applies here. Therefore, this Court should rule that plaintiffs may enforce the Act's reasonable efforts requirement through § 1983 and affirm the decisions below.

A. The Act Unambiguously Grants Plaintiffs a Right to Reasonable Efforts to Preserve and Reunite Them With Their Families.

As with all cases of statutory construction, the "starting point must be the language employed by Congress." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). Under Title IV-E, the Federal Government provides financial assistance to States to help them "provide, in appropriate cases, foster care and transitional independent living programs . . . , and adoption assistance." 42 U.S.C. § 670. Participation by Illinois and other States is purely voluntary, but once a State elects to participate, it must adhere to the terms which Congress has

established for the program. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

The requirements pertinent to this case are contained in 42 U.S.C. §§ 671(a)(3) and (15), which state:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them . . . [and which] provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home. . . .

With this language Congress imposed an explicit condition on a State's eligibility to receive funding. *Pennhurst*, 451 U.S. at 23. In order to receive federal financial assistance, States must develop and implement a plan to make reasonable efforts to keep or to reunite children with their families.

This plain and unambiguous requirement creates an enforceable right for plaintiffs under § 1983. Their claim meets each of the three tests set out in *Golden State* and *Wilder*. First, the reasonable efforts requirement was intended for the benefit of children like the plaintiffs. *Wilder*, 110 S. Ct. at 2517; *Golden State*, 110 S. Ct. at 448. Second, more than "reflect[ing] merely a congressional preference for a certain kind of conduct," § 671(a)(15) creates a "binding obligation" on participating States. *Wilder*, 110 S. Ct. at 2517, *quoting Pennhurst*, 451 U.S. at 19. Finally, the "interest which the plaintiff[s] assert [is] not 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.'" *Golden State*, 110 S. Ct. at 448, *quoting Wright*, 479 U.S. at 431-32. The enforcement of plaintiffs' claim also comports with the policy considerations underlying these tests. Construing § 671(a)(15) to provide an enforceable right will come as no surprise to the States, *Pennhurst*, 451 U.S. at

25, and will give effect to the clearly expressed intent of Congress.

1. *Congress adopted the AACWA to benefit abused and neglected children.*

As the Court of Appeals correctly recognized, Congress enacted the AACWA and its reasonable efforts requirement to stop States from needlessly removing and keeping children from their families. Pet. App. 6a, 10a. While defendants ignore this prong altogether, *see, e.g.*, Brief at 16, the plain language of the Act, *supra* at 2-3, and its legislative history show that Congress enacted the AACWA to benefit children like the plaintiffs.

Prior to the AACWA's enactment in 1980, Congress provided open-ended federal funding for foster care through Title IV-A, as aid to families with dependent children. 42 U.S.C. § 608(a) (1976). Title IV-A contained only minimal protection against the unnecessary separation of children from their families and only minimal encouragement for their return home. Under Title IV-B the Federal Government also contributed little to the States for foster care prevention. S. Rep. No. 336, 96th Cong., 1st Sess. 11, *reprinted in* 1980 U.S. Code Cong. & Ad. News 1448, 1460. States, in turn, used most of the money they received under these provisions to provide foster care, allocating little to placement prevention and even less to family reunification. H.R. Rep. No. 136 at 28.

With a financial incentive to remove children from their homes and no countervailing requirement to provide family preservation and reunification services, States used foster care as the "remedy of first resort, rather than the solution that is employed when all else fails." 126 Cong. Rec. 14645 (June 13, 1980) (remarks of Rep. Conable). By 1979, half a million children had been separated from their families and "locked" in state foster care systems. 125 Cong. Rec. 29938 (October 29, 1979) (remarks of Sen. Cranston). Thousands of children languished in placements—many of dubious quality—with little or no

hope of ever returning to their families or finding another permanent home. S. Rep. No. 336 at 10-11. After describing the nation's foster care system as a "world of horrors," 125 Cong. Rec. 29546 (October 25, 1979), Senator Cranston, the Act's sponsor, stated:

> For far too many children, foster care has ceased to be a temporary, short-term child protection service and has been transformed into a form of long-term childhood imprisonment with the likelihood of a child returning to his or her home, or finding a new adoptive home, decreasing substantially as the months go by.

Id. at 29938 (October 29, 1979).

Congress saw the States' failure to provide, and its own failure to require, reasonable family preservation and family reunification services as the root of this Dickensian nightmare. The House Ways and Means Committee, for example, complained that States regularly housed children in "distant placements which effectively preclude [them] from maintaining communication, or, in many instances, any relationship with [their] famil[ies]," drastically reducing their chances of returning home. H. Rep. No. 136 at 48-49. Individual members of Congress echoed the Committee's concerns. *See, e.g.*, 125 Cong. Rec. 22117 (August 2, 1979) (remarks of Rep. Rostenkowski) ("[i]n a majority of the cases, there are little (sic) or no attempts to reunite the child with the natural family"); 126 Cong. Rec. 14767 (June 13, 1980) (remarks of Sen. Cranston) ("[f]ar too many children and families have been broken apart when they could have been preserved with a little effort").

Congress noted in particular that caseworker assignment problems were a key impediment to family reunification. Foreshadowing the problems which confront plaintiffs in this case, Senator Cranston explained that States regularly left children without caseworkers, setting them "adrift" or "losing" them in the foster care system. 125 Cong. Rec. 29938-39, 29941 (October 29, 1979).

Thus, where reunification could have otherwise been easily achieved, the lack of a caseworker often kept the child from going home. *Id.*

Congress sought to protect children from this harm by requiring participating States to develop and implement plans to make reasonable efforts to preserve and reunite families. Senator Cranston as its sponsor, described this requirement as "critical to our efforts to reform the foster care system." 125 Cong. Rec. 29939 (October 29, 1979). He later summarized the importance of the reasonableness efforts requirement:

> [T]he new provisions will require States to examine alternatives and provide, wherever feasible, home-based services that will help keep families together, or help reunite families. Of course, State child protective agencies will continue to have authority to remove immediately children from dangerous situations, but where removal can be prevented through the provision of home-based services, these agencies will be required to provide such services before removing the child and turning to foster care. These provisions, I believe, are among the most important aspects of this legislation.

126 Cong. Rec. 14767 (June 13, 1980).[1] *See also* 126 Cong. Rec. 14645 (June 13, 1980) (remarks of Reps. Conable and Rousselot); 125 Cong. Rec. 22116 (August 2, 1979) (remarks of Rep. Chisholm); *id.* at 22119 (August 2, 1979) (remarks of Rep. Dodd). In short, application of the first prong of the *Dennis-Golden State-Wilder* test unquestionably supports the conclusion that plaintiffs have an enforceable right under § 1983.

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[1] In interpreting a statute, courts should give substantial weight to the statements of its sponsor. *See Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

2. *Section 671(a)(15) imposes a binding obligation on participating States to make reasonable efforts to preserve families and to reunite children with their families after they have been removed.*

By accepting substantial federal funding under Title IV-E, Illinois has voluntarily entered into a contract with the Federal Government. In consideration of the nearly $70 million it receives annually, Staff of House Comm. on Ways and Means, 102d Cong., 1st Sess., *Overview of Entitlement Programs* 797 (Comm. Print 1991), Illinois has promised to comply with the conditions contained in Title IV-E. *Pennhurst*, 451 U.S. at 17. Illinois has also agreed to comply with those conditions by participating in Title IV-A. 42 U.S.C. § 602(a)(20). In particular, Illinois has agreed to have a plan which meets the requirements of 42 U.S.C. § 671(a). The reasonable efforts mandate is an express requirement of the State plan and an express condition of Illinois' contract. Congress' language could not be more clear: "*In order* for a State to be eligible for payments under [Title IV-E], it *shall* have a plan . . . which . . . shall be *in effect* . . . [and which] provides that, in each case, reasonable efforts *will* be made. . . ." 42 U.S.C. § 671(a)(3), (15) (emphasis added).

All nine Justices in *Wilder* agreed that States are obligated to implement Social Security Act requirements of the type at issue here. In his dissenting opinion, for example, Chief Justice Rehnquist began by stating that the Boren Amendment, which was at issue in that case, "*requires* States to reimburse Medicaid services providers using rates" formulated in accordance with the statute. 110 S. Ct. at 2525 (emphasis added).

Defendants themselves concede that § 671(a)(15) imposes a binding obligation on participating States to make reasonable efforts, describing it as "a point not at issue in this case." Brief at 17. The Solicitor General also admits that the reasonable efforts requirement is mandatory, not precatory. Brief at 13. Yet defendants, citing

Pennhurst, attempt to obscure this Court's remaining task —to determine the competence of courts to enforce § 671 (a)(15)—with assertions that the reasonable efforts requirement is not or could not be a part of their contract with the Federal Government. *See, e.g.*, Brief at 20-26. They claim that Congress could not have mandated that States make reasonable efforts when others dispute the wisdom of such a requirement. *Id.* Defendants' argument reflects a fundamental misunderstanding of the legislative process. Congress has already considered whatever difference of opinion may exist and has authoritatively resolved the issue by making reasonable efforts to preserve and reunite families an unconditional obligation for participating States.[2]

Defendants' reliance on *Pennhurst* is similarly misguided. In *Pennhurst*, the Court construed provisions of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 89 Stat. 486, 42 U.S.C. § 6000 *et seq.* (1976 ed. & Supp. III 1979) (the DDA). It concluded that the DDA's "bill of rights" section, 42 U.S.C. § 6010, did not create enforceable rights, because it was "hortatory, not mandatory." *Id.* The Court relied on the plain language of the DDA, noting that the statute did not condition funding upon a State's compliance with the findings. *Id.* at 23. By comparison, the Court noted that other sections of the DDA—42 U.S.C. §§ 6005, 6009, 6011, 6012, 6063, and 6067—imposed explicit conditions on the grant of federal funds. *Id.* The Court also observed that the Secretary lacked authority to terminate funding when States had failed to comply with § 6010, further supporting its view that § 6010 was unenforceable. *Id.* at 23-24.

Applying the Court's reasoning in *Pennhurst* here, Congress clearly imposed a binding obligation on the States.

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[2] Contrary to defendants' claim, Brief at 24-25, § 672(a)(1) does nothing to alter the mandatory nature of the reasonable efforts requirement. Indeed, Congress viewed the best interest inquiry required by that section as a means to ensure that States would make efforts to keep families together. *See, e.g.*, S. Rep. No. 336 at 15.

First, in § 671(a), Congress expressly conditioned a State's eligibility for federal funding on its adoption and implementation of the reasonable efforts requirement. Second, other requirements imposed on the States by the AACWA are based on the goal of family reunification, such as the case plan and case review requirements, *supra* at 3, and make no sense unless States are required to make reasonable efforts to return children to their families. *See Pennhurst*, 451 U.S. at 18 (statutory provisions to be construed only in context of entire Act).[3] Third, Congress has expressly directed the Secretary to withhold federal funding when States fail to adhere to § 671(a)'s requirements. 42 U.S.C. § 671(b). Thus, under *Pennhurst*, participating States are bound to make reasonable efforts in accordance with § 671(a)(15).[4]

Finally, Illinois' conduct in the wake of the AACWA's adoption lays to rest any suggestion that the State, in

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[3] Defendants tacitly concede that the case plan and case review requirements are enforceable. Brief at 44. But as the District Court stated:

> If those provisions suffice to grant private enforcement rights to the children for whom such case plan and case reviews are required, it seems only logical to draw parallel inferences from other requirements enumerated in the selfsame section[].

Pet. App. at 38a. The case plan and case review requirements only reflected Congress' dissatisfaction with States' performance under the less detailed case plan requirement that had been contained in Title IV-A. 125 Cong. Rec. 29939-40 (October 29, 1979) (remarks of Sen. Cranston). In contrast, under Title IV-A participating States had not been required to make reasonable efforts. Hence, Congress had no historical basis for assuming that States would disregard its new requirement and no reason to believe that the reasonable efforts mandate would require elaborate procedural details. Therefore, the Court should disregard defendants' comparison.

[4] By delaying § 671(a)(15)'s effective date to October 1, 1983, H.R. Conf. Rep. No. 900, 96th Cong., 2d Sess. 46, *reprinted in* 1980 U.S. Code Cong. & Ad. News 1561, 1567, Congress gave States more than three years to prepare for its implementation, providing even more evidence that its family preservation and reunification requirements are mandatory and not merely precatory. *Pennhurst*, 451 U.S. at 24.

accepting funding under the AACWA, was unaware of its obligation to make reasonable efforts. Like other participating States, Illinois has repeatedly affirmed that it is complying with the reasonable efforts requirement in the plans it has submitted for the Secretary's approval. *See, e.g.*, State Plan for Title IV-E of the Social Security Act: Foster Care and Adoption Assistance (October 25, 1988). Moreover, in 1987 the Illinois legislature enacted the Family Preservation Act, P.A. 85-985 (codified at Ill. Rev. Stat. ch. 23, ¶¶ 2057.4, 2058.2, 5005, 5006a and ch. 37, ¶ 802-10), which requires DCFS to provide family preservation services to families whose children have been removed or are at risk of being removed and to develop and implement a plan to make such services available throughout the State. Senator Carroll, the sponsor of the Family Preservation Act, stated:

> Th[e] services [required by the Family Preservation Act] would be provided . . . through the auspices of the Department of Children and Family Services and would allow Illinois to comply with Federal Law 96-272 which is a necessary element of receiving Federal funds for child welfare.

Transcription Debate, 85th General Assembly, June 24, 987, p. 185.[8]

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[8] Legislative activity in other States also confirms that Congress spoke with a clear voice when imposing the reasonable efforts requirement as a binding obligation on the States. Nearly all of the States, including most of those supporting defendants, have enacted legislation embodying the family preservation and reunification requirements of the Act, with the bulk of it adopted after 1980. *See, e.g.*, Ark. Code Ann. § 9-27-328 (Michie Supp. 1989); Cal. Welf. & Inst. Code § 11404 (West 1991); Del. Code Ann. tit. 29, § 9003(3) (Supp. 1990); Fla. Stat. Ann. §§ 39.402(2), (7), (8) (West Supp. 1991), 39.41(4), .422(1), .422(5) (West 1988); Ga. Code Ann. §§ 15-11-41(b), (c) (1990); Idaho Code §§ 16-1614(e)(2), (4) (Michie Supp. 1991); Ind. Code Ann. §§ 31-6-4-19(b) (Burns Supp. 1990), 31-6-11-10(b) (Burns 1987); Iowa Code Ann. §§ 232.52(6), .95(2)(a) (West 1985), 232.102(5)(b) (West Supp. 1991); Kan. Stat. Ann. §§ 38-1542(f), -1563(h) (1986); Ky. Rev. Stat. § 620.140 (1)(c) (Michie 1990); La. Code Juv. Proc. Ann. art. 87(F) (West

Thus, with full knowledge of the Act's requirements, Illinois has accepted millions of dollars in federal funding and has agreed to a role for the Federal Government in its child welfare system. Defendants cannot now disregard their end of the bargain. They are obligated to make reasonable efforts.

3. *Section 671(a)(15) is neither too vague nor too amorphous for a court to enforce.*

Having satisfied the first and second prerequisites of *Dennis*, *Wilder*, and *Golden State*, plaintiffs' claim also meets the third and last test for the existence of a right under § 1983.[6] Like the reasonableness provision which

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1990); Me. Rev. Stat. Ann. tit. 22, § 4041(1)(A) (West Supp. 1990); Mass. Gen. Laws Ann. ch. 119, § 29C (West Supp. 1991); Minn. Stat. Ann. §§ 256.F.01(1), (2), 260.012 (West Supp. 1991); Miss. Code Ann. § 43-21-309(4), -405(6), -603(7) (Supp. 1990); Mo. Ann. Stat. § 211.183 (Vernon Supp. 1991); Neb. Rev. Stat. §§ 43-246(4), -254 (1988); Nev. Rev. Stat. Ann. §§ 432B.360(1)(a) (Michie 1986), .550(1) (Michie Supp. 1989); N.H. Rev. Stat. Ann. § 169-C:34(II) (1990); N.M. Stat. Ann. § 32-1-34(A) (Michie 1989); N.Y. Soc. Serv. Law § 358-a(1) (Consol. Supp. 1990), N.Y. Fam. Ct. Act § 352.2(2)(b) (Consol. Supp. 1990); Ohio Rev. Code Ann. § 2151.419 (Baldwin 1989); Okla. Stat. Ann. tit. 10, § 1104.1 (West Supp. 1991); Or. Rev. Stat. Ann. §§ 419.576(2)(c), .577 (3)(b) (Butterworth Supp. 1990); 62 Pa. Cons. Stat. Ann. §§ 2171-2175 (West Supp. 1990); Va. Code § 16.1-251(A)(2), -252(A) (Michie Supp. 1991), -279(A)(3)(c), -279(C)(5)(c) (Michie 1988); Wash. Rev. Code Ann. § 13.32A.170(1)(d), .34.060(8)(a), .34.130 (5)(b)(i) (West Supp. 1991); Wis. Stat. Ann. §§ 48.21(5)(b) (West 1987), 48.355(2)(b)(6) (West 1987 & Supp. 1989).

[6] Defendants and the Solicitor General encourage the Court in passing to add a fourth prerequisite for the existence of a right under § 1983. Relying on the dissenting opinion in *Wilder*, they suggest that other than filing and approval requirements, legislation enacted pursuant to the Spending Clause cannot create enforceable rights. Defendants' Brief at 19 n.7; Solicitor General's Brief at 12 n.6. The Council of State Governments, et al. (CSG), go even further afield, arguing that Congress can create no rights whatsoever through Spending Clause statutes. CSG Brief at 9-16.

Neither defendants nor the Solicitor General offers any reason whatsoever for overturning *Wilder* and countless cases enforcing "State plan" requirements in other federal-state cooperative pro-

this Court held to be enforceable in *Wilder*, the reasonable efforts requirement is sufficiently specific here to be judicially enforceable.

In *Wilder* the Court construed the Boren Amendment to the Medicaid Act, which requires States, as a condition of receiving federal funding for Medicaid, to reimburse providers using rates:

> which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access . . . to inpatient hospital services of adequate quality.

42 U.S.C. § 1396a(a)(13)(A) (1982 & Supp. V 1987). Dismissing the argument that the Boren Amendment was too vague and amorphous, this Court held that it created an enforceable right under § 1983. 110 S. Ct. at 2517-25. The Court reasoned:

> That the Amendment gives the States substantial discretion in choosing among reasonable methods of cal-

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grams or disregarding the plain language of § 1983. Indeed, *Dennis* thoroughly refutes the Solicitor General's suggestion that "intergovernmental arrangements," Solicitor General's Brief at 12 n.6, allocating rights and responsibilities between the States and the federal government cannot create enforceable rights. 111 S. Ct. at 870-72. Likewise, the CSG offers no basis for reversing *Maine v. Thiboutot*, in which the Court rejected a comparable limitation proposed for § 1983, 448 U.S. at 6-8, and held that private beneficiaries may enforce requirements imposed upon States by the Social Security Act. Moreover, this issue was never raised below, was not addressed in the petition, and is not even squarely presented in defendants' brief. Accordingly, this Court should adhere to the rule of *stare decisis* and apply the *Dennis-Wilder-Golden State* test in affirming the decision below. *See Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2370 (1989) (describing particularly heavy burden borne by party seeking "to overrule a point of statutory construction").

> culating rates may affect the standard under which a court reviews whether the rates comply with the Amendment, but it does not render the Amendment unenforceable by a court. While there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act.

Id. at 2523 (emphasis in original).

Similarly, the AACWA gives participating States substantial discretion (though less than the Boren Amendment[7]) in developing and implementing a plan to make reasonable efforts in each case. In permitting discretion, however, Congress did not render the Act unenforceable under § 1983. *See also King v. Smith*, 392 U.S. 309, 318-19 (1968) (enforcing State's obligation to provide AFDC benefits, despite "States hav[ing] considerable latitude in allocating their AFDC resources"). While there may be a range of reasonable efforts which the States may employ to prevent foster care placement and to reunify foster children with their families, Illinois' practice of systematically depriving children of caseworkers clearly falls outside that range.

Finally, defendants' abstract discussion of the statute, which ignores the tragic consequences of their actions in this case, should be disregarded. As the Court made clear in *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988), apart from legislation involving capital punishment or threatening First Amendment interests, "[v]agueness challenges to statutes . . . are examined in light of the facts of the

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[7] Under the Boren Amendment, a participating State must reimburse Medicaid providers at rates which the State itself finds to be "reasonable and adequate." 42 U.S.C. § 1396a(a)(13)(A). By contrast, through the AACWA, Congress requires each participating State to make reasonable family preservation and reunification efforts without interposing the State as the sole judge of its efforts. Thus, the very plain language of § 671(a)(15) places no limitation on the right it confers—the right to a State plan providing for reasonable efforts. *Cf. Wilder*, 110 S. Ct. at 2527 (Rehnquist, C.J., dissenting).

case at hand; the statute is judged on an as-applied basis." *Id.* at 1858. *Accord United States v. National Dairy Products Corp.*, 372 U.S. 29, 31-33 (1963); *see also Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249, 1253 (1990) (under case-or-controversy requirement, federal courts may not decide questions before them based on hypothetical situations).[8] As applied to the facts in this case, the reasonable efforts clause is sufficiently specific to be judicially enforceable.

a. *Enforcement of § 671(a)(15) is well within the competence of the judiciary, when, as a result of defendants' systemic failure to assign caseworkers promptly, Illinois fails to make any efforts to keep or to reunite children with their families.*

The District Court found that defendants must assign caseworkers to children in order to make *any* efforts to prevent or eliminate the need for placing them in foster care or to reunite foster children with their families. To use the Court of Appeals' description, the caseworker is a "lifeline" for the child. Pet. App. 12a. Defendants do not dispute this.

In protective order cases, DCFS must assign a caseworker to arrange the services necessary "to ease or eliminate the crisis that led to the child's mistreatment." J.A. 36, ¶ 6. A caseworker is necessary to procure counseling and homemaker services, substance abuse treatment programs, and other assistance for parents who need help to meet their children's basic needs. *Id.* The caseworker is also responsible for monitoring the child's safety to protect the child from the risk of further harm. *Id.* Similarly, a caseworker is essential in custody cases to fulfill

[8] Although the defendants in *Maynard* and *National Dairy* challenged the relevant statutes on constitutional grounds, the policy considerations discussed in those cases fully support enforcement of § 671(a)(15) as well, since defendants here clearly understood that their conduct was proscribed by the statute. *Maynard*, 108 S. Ct. at 1858; *National Dairy*, 372 U.S. at 32-33.

the State's responsibility to attempt to reunify children with their families. J.A. 35, ¶ 4. The caseworker alone arranges a placement for the child where reunification services can be provided, facilitates visitation, and develops a case plan. *Id.*

Without a caseworker, children who remain at home under DCFS supervision are denied services to prevent the need to remove them from their families. J.A. 38, ¶ 11. Some children are left hungry when no caseworker is assigned to help their parents find food. *Id.* Others are placed at risk when no caseworker is assigned to arrange for court-ordered drug treatment for their parents. *Id.* In some cases children continue to be severely abused when no caseworker is assigned to monitor their safety. *Id.* Defendants' failure to assign caseworkers promptly in protective order cases thus increases the likelihood that children will be removed from their homes. J.A. 38-39, ¶ 12.

By failing to assign caseworkers in custody cases, defendants prevent children who are placed in shelters, institutions, and foster homes from being returned to their families. These children are denied essential sex abuse treatment, counseling, and psychiatric care; they cannot visit their parents, brothers, or sisters; and they are deprived of a plan for family reunification, when defendants fail to assign them caseworkers. J.A. 37, ¶ 9.

In sum, under defendants' own system, when caseworkers are not assigned, DCFS can make no efforts, let alone reasonable ones, to preserve or to reunite children with their families.[9] Defendants argue that the District Court could not competently assess their compliance with the reasonable efforts requirement without looking

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[9] Professional standards in child welfare uniformly support the District Court's findings regarding the importance of caseworkers and the need for their prompt assignment. *See, e.g.*, Child Welfare League of America, *Standards for Services to Strengthen and Preserve Families with Children* § 2.44 (1989); E. Cole & J. Duva, *Family Preservation* 2 (1990); Child Welfare League of America, *Standards for Foster Family Service* §§ 3.4, 3.9, 4.27, 4.33 (1984).

at other aspects of the DCFS system. Brief at 29 n.16. But it was defendants who made caseworkers the undisputed linchpin of their plan to make reasonable efforts, as the District Court properly found. J.A. 35-39, ¶¶ 4-12.[10] *See generally Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985) (findings of fact by trial court to be afforded great deference on review).

There is nothing subjective about plaintiffs' need for caseworkers. Reasonable efforts cannot be made without them. Therefore, a court need only determine that caseworkers are not being assigned in order to find a violation of the Act—an "inquiry well within the competence of the judiciary," *Wilder*, 110 S. Ct. at 2523, as the District Court's findings show. *See, e.g.*, J.A. 39, ¶¶ 13-19. Similarly, defendants' complete reliance on caseworkers to fulfill the requirements of § 671(a)(15) makes it quite simple for a court to fashion appropriate and narrowly tailored relief for the class plaintiffs. *Cf. Wright*, 479 U.S. at 438 (O'Connor, J., dissenting).[11]

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[10] Taking a slightly different approach, the CSG argues that the District Court could not competently look at caseworker assignment in assessing what is reasonable since, in its view, States must be free to devote caseworkers to assist certain families while doing nothing on behalf of others. CSG Brief at 24-25. Besides distorting the facts of this case, *see, e.g.*, J.A. 39, ¶ 13, J.A. 44-45, ¶ 19, their argument ignores the plain language of the Act and the Secretary's interpretation of it, 48 Fed. Reg. 23107 (1983), both of which require the State's plan to provide that reasonable efforts will be made *in each case*.

Nor does defendants' use of caseworkers constitute an "enforcement decision." CSG Brief at 24. Having accepted Title IV-E funding, Illinois has no choice but to comply with the reasonable efforts mandate. *Supra* at 18-22. Consequently, the CSG's reliance on *Heckler v. Chaney*, 470 U.S. 821 (1985), is misplaced. Defendants' use of caseworkers here is no different from other agency actions, which courts are presumed competent to review. *See Traynor v. Turnage*, 108 S. Ct. 1372, 1378 (1988).

[11] Consistent with *Wilder*, the District Court employed an extremely deferential standard of review. First, the Court "deferred issuance of its post-hearing finding (sic) of fact and conclusions of law pending . . . DCFS' implementation of a restructuring plan

b. *Enforcement of the reasonable efforts requirement of § 671(a)(15) is fully supported by countless federal court cases enforcing reasonableness requirements in federal statutes.*

Federal courts have a long history of enforcing reasonableness requirements—including reasonable efforts requirements—in other federal statutes. In *Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937), for example, this Court applied § 2, First, of the Railway Labor Act, 44 Stat. 577, 45 U.S.C. § 152, which requires carriers and employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." The Court held unequivocally that federal courts were fully competent to enforce such a requirement. Writing for the Court, Chief Justice Stone stated:

> There is no want of capacity in the court to direct complete performance of the entire obligation. . . . Whether an obligation has been discharged, and whether action taken or omitted is in good faith or

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directly addressing the delays in caseworker assignments." Pet. App. 33a-34a. Even after affirming that plaintiffs had stated a cause of action under the Act, the District Court requested a report regarding DCFS's reorganization plan to determine whether defendants had addressed the violations proved at the preliminary injunction hearing ten months earlier. Pet. App. 50a. All told, the District Court waited over a year after the hearing to enter the preliminary injunction.

Similarly, the District Court deferred to defendants in fashioning a remedy for their violations of the Act. The District Court relied heavily on DCFS's own system, under which caseworkers are essential to make efforts to preserve and reunify families. Pet. App. 16a-17a. The District Court also tailored its order to the goal which defendants themselves had established—caseworker assignment and reassignment within three days. J.A. 48, ¶ 37. The court thereby rejected the more restrictive relief originally sought by plaintiffs—initial assignment within 24 hours and continuous reassignment thereafter—as inconsistent with DCFS's capabilities, needs, and plan. *Id.* As the Court of Appeals stated, "the [D]istrict [C]ourt has . . . not attempted to fashion a remedy that interferes with the daily operation of the DCFS." Pet. App. 12a.

> reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees.

300 U.S. at 550. *See also Chicago & Northwestern Ry. Co. v. United Transportation Union*, 402 U.S. 570 (1971). Accordingly, this Court has construed and enforced reasonable efforts requirements embodied in other federal statutes and rules as well. *See, e.g., Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 77 (1977) (finding that employer had made "reasonable efforts" to accommodate the plaintiff's religious beliefs in accordance with 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1)); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-76 (1974) (enforcing "reasonable efforts" requirement in notice provisions of Fed. R. Civ. P. 23(c)(2)).

The Court has also unhesitatingly enforced other reasonableness requirements in federal statutes, even when litigants have challenged its competence to do so. In *Wright*, for example, this Court addressed the enforceability of a reasonableness requirement in regulations implementing the Brooke Amendment, 42 U.S.C. § 1437a (1982 & Supp. III 1985). The Court held that the regulations, which required public housing authorities to provide for "reasonable amounts of utilities" in calculating rents, 24 C.F.R. § 860.403 (1982), were judicially enforceable. 479 U.S. at 431-32. Moreover, only last term, this Court again confirmed that individuals may enforce reasonableness requirements in federal statutes and rules in the federal courts. *See, e.g., International Organization of Masters, Mates & Pilots v. Brown*, 111 S. Ct. 880 (1991) (enforcing requirement of 29 U.S.C. § 481(c) that union comply with all reasonable requests to distribute material for union election); *United States v. R. Enterprises*, 111 S. Ct. 722 (1991) (applying reasonableness requirement of Fed. R. Crim. P. 17(c) to grand jury subpoena).[12]

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[12] Decisions from last term also confirm that federal courts regularly and competently apply reasonableness requirements other than those contained in federal statutes. *See, e.g., Florida v. Jimeno,*

Finally, Congress has imposed reasonableness standards on States through other state plan-based provisions of the Social Security Act, and this Court has affirmed their enforceability, albeit in dicta. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 659 n.8 (1974) (affirming Court of Appeals' construction of "reasonable promptness" in 42 U.S.C. § 1382(a)(8)); *Jefferson v. Hackney*, 406 U.S. 535, 545 (1972) (construing 42 U.S.C. § 602(a)(10)'s "reasonable promptness" standard as barring "den[ial] of benefits[,] even temporarily, to a person who has been found fully qualified for aid"). In *Pennhurst* as well, this Court utilized 42 U.S.C. § 602(a)(10), including its reasonableness requirement, as a model of enforceability in a Spending Clause statute. 451 U.S. at 18.

Section 671(a)(15), as part of the Social Security Act, is equally enforceable. *See also Youngberg v. Romeo*, 457 U.S. 307, 322 (1982) (obligating States, through § 1983, to provide reasonable services to those in their care). Paraphrasing *Wilder*, "[a]lthough some knowledge of [child welfare] might be required to evaluate . . . the reasonableness of [a State's efforts], such an inquiry is well within the competence of the judiciary." 110 S. Ct. at 2523.

c. *State court enforcement of the reasonable efforts requirement, explicitly mandated in certain limited circumstances by 42 U.S.C. § 672(a)(1) and embraced by defendants, also confirms that courts are competent to enforce § 671(a)(15).*

Through 42 U.S.C. § 672(a)(1), state courts are obligated to ensure—albeit only in very limited circumstances, *infra* at 36-37—that the States make reasonable efforts to

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111 S. Ct. 1801 (1991) (determining search and seizure to be reasonable under Fourth Amendment); *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991) (construing forum-selection clause in contract to be reasonable and, hence, enforceable). Moreover, like the cases discussed in the text, these cases refute defendants' suggestion that federal courts are incompetent to assess the reasonableness of anything other than a numerical requirement.

preserve and reunite families. Defendants enthusiastically embrace state court enforcement of this requirement. Brief at 30 n.17. Indeed, in their view, § 672(a)(1) is sufficiently specific to preclude enforcement of § 671(a)(15) under *Sea Clammers*. Brief at 41. Yet defendants fail to show how the State's obligation to have a plan in effect to make reasonable efforts—the very requirement on which § 672(a)(1) is based—is any less specific.[13]

Unable to explain why § 671(a)(15) is any less enforceable, defendants and amici supporting them next attempt to distinguish the competence of the courts hearing claims under these two provisions. The Solicitor General, for example, argues that state courts alone are competent to make reasonable efforts determinations, because state court judges hearing abuse and neglect cases are supposedly "specialized." Brief at 25-26. He thereby misstates both the law and the facts in Illinois, where all trial courts are courts of general jurisdiction, *In re Greene*, 76 Ill. 2d 204, 213, 390 N.E.2d 884, 888 (1979), and only one county has judges who hear only abuse and neglect cases. *See* Circuit Court of Cook County General Order 1.2.

Defendants' suggested dichotomy becomes all the more untenable in light of the purpose of § 1983, which was enacted to provide a *federal court* remedy for violations of federal rights. *Patsy v. Board of Regents*, 457 U.S. 496, 502-05 (1982). Under defendants' proposal, individual plaintiffs would remain free to mount a § 1983 challenge to a State's plan to make reasonable efforts only in state courts,[14] because of their purported exclusive competence to address those issues.

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[13] Defendants' acceptance of class certification further undercuts their argument that the term "reasonable efforts" is sufficiently specific to be enforced only in individual cases. R. 10 at 1.

[14] On the other hand, if adopted by this Court, defendants' argument that the reasonable efforts requirement of § 671(a)(15) is too vague to be enforceable might lead state courts to conclude that they are incapable of making the reasonable efforts deter-

This Court should reject defendants' distinction. The federal courts, though courts of general jurisdiction, are capable of enforcing federal statutory requirements, including the requirement that participating States implement plans to provide reasonable efforts—particularly given Congress' forceful articulation of this guarantee.

d. *The history of the Act demonstrates that Congress intended § 671(a)(15) to be judicially enforceable.*

The legislative history shows not only the paramount importance of the Act's family preservation and family reunification requirements, *supra* at 15-17, but also Congress' intent that § 671(a)(15) be judicially enforceable. Congress enacted the AACWA shortly after this Court's decision in *Miller v. Youakim*, 440 U.S. 125 (1979), which enforced the State plan requirements relating to abused and neglected children in Title IV-A. Congress was well aware of that decision at the time the AACWA was enacted, 125 Cong. Rec. 29538 (October 25, 1979) (remarks of Sen. Cranston), and did nothing to limit its effect on the new statute. It thereby incorporated the enforceability of State plan requirements from the *Youakim* decision into the state plan requirements in Title IV-E. *See Pierce v. Underwood*, 108 S. Ct. 2541, 2551 (1988).

Senator Cranston's remarks provide further evidence that Congress intended for courts to have a role in enforcing § 671(a)(15). Describing the predecessor provisions in Title IV-A, Senator Cranston stated:

> These very generalized provisions have had little specific impact upon a State's responsibility to provide services designed to prevent a child's removal from his or her home, or to help alleviate the problem which caused the child's removal in the first place. Accordingly, some courts have specifically held that social services agencies had no affirmative duty to

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minations required by § 672(a)(1), thereby causing an even greater departure from the plain language of the statute.

> provide preventive services to a distressed family before the removal of a child.

126 Cong. Rec. 14767 (June 13, 1980). Section 671(a)(15) was enacted to remedy the courts' failure to enforce the earlier provisions:

> The Senate amendment provided specific requirements that States must include in their Title IV-E program plan provisions to assure that in each case reasonable efforts be made prior to the placement of a child in foster care to prevent or eliminate the need for removal of a child from his home and that reasonable efforts be made to make it possible for a child to return to his [home].

Id. Neither defendants nor amici supporting them present any legislative history to refute the evidence that Congress intended 42 U.S.C. § 671(a)(15) to be enforceable.

e. ***Federal regulations and state court cases provide objective benchmarks for determining whether a State has a plan in effect to make reasonable efforts to preserve and reunite families.***

Regulations promulgated by the Secretary of Health and Human Services describe specific services which a State may provide as part of its plan to help preserve and reunify families under the reasonable efforts requirement. 45 C.F.R. §§ 1356.21(b), 1357.15(e)(2). These regulations provide as much guidance to courts in assessing a State's plan as the "*factors* which a State must *consider* in adopting its rates" did in *Wilder*. 110 S. Ct. at 2522 (emphasis added). And like the Boren Amendment, the regulations here "provide[], if anything, more guidance than the provision at issue in *Wright*." *Id.* at 2522 n.17, *citing Wright*, 479 U.S. at 437 (O'Connor, J., dissenting).[15]

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[15] In view of these regulations, defendants' attempt to portray the AACWA's case plan requirements as irrelevant to this case is spurious. Brief at 31 n.18. Even if caseworkers were assigned on day 60 to prepare case plans (which, as pliantiffs alleged in their complaint, J.A. 16, 18, 24, 25, ¶¶ 44, 52, 69, 74(b), and proved at the

To escape this conclusion, defendants and the Solicitor General look at *Wilder's* "objective benchmark" only in the abstract. Defendants' Brief at 28-29; Solicitor General's Brief at 15-16. They fail to acknowledge that its formulation is only the first step in assessing hospital rembursement rates under State Medicaid plans.[16] The second step requires its application to each participating hospital—a task which, at a minimum, must account for the number of low income patients with special needs served by each hospital and for cases in which patient care has been inadequate. 42 U.S.C. § 1396a(a)(13)(A). Yet the need for a particularized application of a standard to each hospital does not render the Boren Amendment's state plan requirement subjective or unenforceable if a State sets reimbursement rates without

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hearing, Pet. App. 53a (¶ 2(b)), is often not the case), defendants' failure to assign caseworkers promptly at the outset of a case and at other times guarantees that many case plans will contain no discussion of efforts made to preserve or to reunite the family, because no efforts will have been made. Thus, defendants' failure to assign caseworkers promptly violates 45 C.F.R. §§ 1356.21(b) and 1356.21(d)(4). The District Court properly recognized the close connection between caseworker assignment and appropriate case plans as well, Pet. App. 38a, 41a, 44a, 53a, regardless of its remarks from the bench.

[16] Moreover, even at this level of abstraction, the Boren Amendment's objective standard supports enforcement of the reasonable efforts requirement. As a threshold matter, courts applyling the Boren Amendment must first determine what constitutes "reasonable" access to "adequate" health care for Medicaid-eligible individuals. 42 U.S.C. § 1396a(a)(13)(A). Only after making these non-numerical (but required) determinations can courts estimate "the costs which must be incurred by efficiently and economically operated facilities." Defendants and the Solicitor General make only passing reference to the required determinations underlying the supposedly mindless calculation of rates—and with good reason. Since courts can objectively determine, for example, what type of access to health care under a State's Medicaid plan is reasonable, they can, with equal competence, determine whether a State's efforts to keep children with their families under its AACWA state plan are reasonable.

any regard for the needs of individual hospitals. Similarly, the fact that the Secretary's regulations must be applied to particular families does not render unenforceable the State's obligation to have a plan in effect to provide reasonable efforts when it makes no efforts to keep families together. Consequently, the faulty comparison contrived by the defendants and the Solicitor General should be disregarded.

State courts have also construed the reasonable efforts mandate (or the States' own related requirements) in countless cases involving abused and neglected children.[17] Likewise, state courts have enforced an almost identical family preservation and reunification requirement in the federal Indian Child Welfare Act. 25 U.S.C. § 1912(d).[18] These cases provide extensive additional guidance to federal courts in determining whether a State has adopted and implemented a plan to make reasonable efforts.[19]

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[17] *See, e.g., In re Adam E.*, 125 N.H. 368, 480 A.2d 160 (1984) (Souter, J.); *In the Interest of Burns*, 519 A.2d 638, 647-49 (Del. 1986); *Matter of Sheila G.*, 61 N.Y.2d 368, 462 N.E.2d 1139, 474 N.Y.S.2d 421 (1984); *In re Nicole G.*, 577 A.2d 248 (R.I. 1990); *In the Interest of M.H.*, 444 N.W.2d 110, 112-13 (Iowa App. 1989); *In re Interest of Kenny F.*, 109 N.M. 472, 786 P.2d 699, 703-04 (App. 1990); *In the Interest of S.A.D.*, 382 Pa. Super. 166, 555 A.2d 123, 127-28 (1989); *In re Victoria M.*, 207 Cal. App. 3d 1317, 255 Cal. Rptr. 498, 503-05 (1989); *In the Interest of A.B.*, 444 So. 2d 981 (Fl. App. 1983); *In the Matter of Jones*, 436 N.E.2d 849, 851 (Ind. App. 1982); *In the Interest of A.M.K.*, 723 S.W.2d 50, 851 (Ind. App. 1982); *In the Interest of A.M.K.*, 723 S.W.2d 50, 52-53 (Mo. App. 1986). *But see In re Carl O.*, 10 Conn. App. 428, 523 A.2d 1339, 1343 (1987).

[18] *See, e.g., In the Interest of S.R.*, 323 N.W.2d 885, 887 (1982); *In re Smith*, 46 Wash. App. 647, 731 P.2d 1149, 1153 (Div. 1 1987).

[19] State court cases cited by defendants, Brief at 25-26, in which the court applied another standard are irrelevant to the enforceability of the reasonable efforts requirement. Others merely show that the efforts required need only be reasonable, not Herculean or interminable. *See, e.g., In re Edward C.*, 126 Cal. App. 3d 193, 206, 178 Cal. Rptr. 694, 701-02 (1st Dist. 1981).

Neither *Golden State* nor *Wilder* expressly requires an objective benchmark in order for a statutory provision to be enforceable under § 1983. *See also Dennis*, 111 S. Ct. 865. Nonetheless, to the extent one is helpful, regulations enacted by the Secretary and cases decided by state courts interpreting the Act provide guidance to courts in enforcing § 671(a)(15).

B. Congress Did Not Foreclose § 1983 as a Remedy for Systemic Violations of Children's Right to Reasonable Efforts.

Having granted children the right to reasonable efforts to remain with or to return to their families under the State's plan, Congress did not simultaneously foreclose or intend to foreclose its enforcement under § 1983. The Act contains nothing which even approximates the comprehensive remedial scheme necessary to demonstrate otherwise. *Sea Clammers*, 453 U.S. at 20-21. Accordingly, plaintiffs' right to reasonable efforts is fully enforceable under § 1983.

In addition to their improper presentation,[20] defendants' claims to the contrary are wrong. Section 672(a)(1) does not provide any role for state courts in monitoring the State's efforts to return foster children to their homes. Thus, § 672(a)(1) is completely irrelevant to the plaintiffs who are already in DCFS's custody. Likewise,

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[20] Defendants presented two questions in their petition. The first asks "[w]hether § 671(a)(15) . . . is too vague and amorphous to create an individually enforceable right under 42 U.S.C. § 1983." Pet. at i. If § 671(a)(15) is not too vague, the second question then comes into play—whether children who remain at home may enforce that requirement. Pet. at i, 19-20. Neither of these fairly includes, nor did the text of the petition address, the question of whether Congress "has foreclosed . . . enforcement of the statute in the enactment itself." *Wright*, 479 U.S. at 423. Defendants have now rephrased the questions presented, as permitted by this Court's Rule 24.1(a). They may not, however, thereby raise new issues. Accordingly, this Court should refrain from considering this question. Sup. Ct. R. 14.1(a). Nonetheless, plaintiffs briefly address defendants' argument.

state court judges have no ongoing role in ensuring that efforts are being made while the child remains at home. The AACWA requires only that they determine, at the time a State takes custody of a child, whether the State had made reasonable efforts to prevent the need for removal in that case—in other words, when it may already be too late. Finally, § 672(a)(1) does not provide any mechanism, let alone a sufficient or comprehensive one, to remedy a State's systemic failure to make reasonable efforts. Closed to class grievances, it provides no evidence of Congress' intent to preclude a § 1983 remedy. *Wright*, 479 U.S. at 427.

Other provisions of the AACWA also leave recourse to § 1983 unaffected. The Secretary's "generalized powers" to cut off funds under § 671(b) "are insufficient . . . to foreclose § 1983 remedies." *Wright*, 479 U.S. at 428. *See also Rosado v. Wyman*, 397 U.S. 397, 420 (1970). First, the AACWA does not require and HHS does not provide any formal mechanism for children to initiate enforcement proceedings against States that fail to adhere to the reasonable efforts requirement. *See Wright*, 479 U.S. at 428. Second, as the Solicitor General admits, Brief at 26 n.14, the Secretary fails to conduct *any* review of a State's efforts, relying exclusively on the narrowly circumscribed state court findings under § 672(a)(1). *See* HHS Review Guide, ACYF-IM-85-25, Att. A (Aug. 1985).[21] Finally, a cut-off of Title IV-E funding would only hurt the intended beneficiaries of the Act, leaving § 1983 as a far more appropriate remedy.

Moreover, state administrative activities required by the AACWA do not preclude enforcement of its reasonable efforts mandate through § 1983. *Patsy*, 457 U.S. 496 (1982). The provisions cited by defendants are also

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[21] The Solicitor General's citation to these provisions, Brief at 26 n.14, thoroughly undermines his earlier suggestion that the State's obligation to implement a plan to make reasonable efforts is enforced through administrative mechanisms. *Id.* at 14 n.7.

patently inadequate to remedy either systemic or individual violations of the Act. Case plans are written documents prepared by the state agency, not remedial devices. 42 U.S.C. § 675(1). They need not even be given to the child. 45 C.F.R. § 1356.21(d)(1). *See also* 89 Ill. Admin. Code § 305.5(c)(4) (requiring that case plans be given to children only when they participate in their preparation). Case reviews, provided only for children in DCFS's custody, occur only once every six months and similarly provide no remedy whatsoever for a State's violation of § 671(a)(15). 42 U.S.C. § 675(5)(B). Dispositional hearings, also provided only for children in DCFS's custody, if at all, *see Dana W. v. Suter*, No. 90 C 3479 (N.D. Ill.) (alleging systemic and continuing failure by DCFS to provide dispositional hearings); *In re Illinois Department of Children and Family Services*, HHS Appeals Board, No. 87-154, Decision No. 1037 (April 13, 1989) (finding DCFS in violation of dispositional hearing requirement), provide no more of a remedy. 42 U.S.C. § 675(5)(C).

Thus, far from the comprehensive remedial schemes reviewed by this Court in other cases, *see, e.g., Smith v. Robinson*, 468 U.S. 992 (1984),[22] the provisions of the AACWA which defendants cite provide, at most, only piecemeal and sporadic opportunities for individual plaintiffs to challenge the reasonableness of a State's efforts.

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[22] In *Smith v. Robinson*, the Court construed the Individuals with Disabilities Education Act, 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq.* (then entitled the "Education of the Handicapped Act"). In contrast to the AACWA, the IDEA expressly authorizes a cause of action in accordance with its terms. 20 U.S.C. § 1415(e). It allows aggrieved parties to challenge a State's decision "with respect to *any* matter relating to" educational services provided. *Id.* at § 1415(b)(1)(E) (emphasis added). The statutes at issue in *Sea Clammers* provided equally wide-ranging and express authorization for private causes of action. *See, e.g.*, 453 U.S. at 7 n.11, *citing* 33 U.S.C. § 1415(g)(1) (authorizing civil action for violation of any aspect or application of the statute).

Even in combination, they provide no remedy whatsoever for systemic violations of the Act. On the contrary, they leave ample room for and are unaffected by the relief granted here through § 1983. *See Wright*, 479 U.S. at 423. Defendants fail to meet their heavy burden to show otherwise. *Robinson*, 468 U.S. at 1012.

II. PLAINTIFFS MAY ENFORCE THE AACWA'S REASONABLE EFFORTS REQUIREMENT DIRECTLY THROUGH AN IMPLIED CAUSE OF ACTION.[23]

In addition to the remedy under § 1983, the courts below correctly found that plaintiffs have an implied cause of action under the Act. In *Cort v. Ash*, 422 U.S. 66 (1975), this Court articulated the test for implying a claim directly under a statute:

> First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78 (citations and internal quotations omitted, emphasis in original). The inquiry into legislative intent is the most important factor in the analysis. *Universities Research Assn., Inc. v. Coutu*, 450 U.S. 754, 771-772 (1981). In decisions since *Cort*, the Court has viewed the first and third prongs of *Cort* as indicative of that intent.

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[23] As plaintiffs argued in their brief in opposition to certiorari, defendants waived this claim by challenging only the enforceability of the AACWA under § 1983. Brief in Opposition at 16-18. Plaintiffs respond to defendants' argument here because the courts below relied on this issue in enforcing the AACWA.

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 23-24 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-576 (1979).

Applied here, these tests support the existence of an implied cause of action. In enacting the AACWA, Congress intended to create an implied cause of action, as the legislative history outlined above, *supra* at 15-17, clearly demonstrates. An express indication that an implied right of action was intended is unnecessary. As this Court stated in *Cannon v. University of Chicago*, "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." 441 U.S. 677, 694 (1979).

Consideration of *Cort's* other factors also supports the implication of a private right of action under the Act. Congress passed the Act to protect abused and neglected children like the plaintiffs. *Supra* at 15-17. Where, as here, a statute protects a particular group rather than providing a generalized ban on proscribed conduct, this Court infers an intention to protect the rights of individuals in that group. *California v. Sierra Club*, 451 U.S. 287, 294-95 (1981). In addition, implying a private right of action is completely consistent with the underlying purpose of the Act. Litigation seeking to enforce the Act's protections would promote, not hinder the Act's purpose, especially in the absence of a comprehensive remedial scheme.

Finally, although child welfare was an area traditionally left to the States prior to the Act's passage, congressional dissatisfaction with the States' failure to keep families together was the impetus for the Act. By accepting federal funding, all 50 States have agreed to give the Federal Government an expanded role in child welfare, as well. All of these factors lead to the conclusion that the Court should imply a cause of action directly under the Act.

III. ABUSED AND NEGLECTED CHILDREN LIVING AT HOME UNDER DCFS'S SUPERVISION ARE EQUALLY ENTITLED TO ENFORCE THE ACT'S REASONABLE EFFORTS REQUIREMENT.

Under the plain language of its AACWA contract, Illinois is expressly obligated to make reasonable efforts to allow children to remain with their families. The relevant text of the Act bears repeating:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . provides that, in each case, reasonable efforts will be made . . . *prior to* the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home. . . .

42 U.S.C. § 671(a)(15) (emphasis added). Through this provision, Congress expressly imposed a binding obligation on participating States to make reasonable efforts to keep children out of foster care.

Defendants completely ignore this plain language. Instead, in an effort to render § 671(a)(15)(A) meaningless, they allege that Illinois does not and cannot receive any federal funding to enable the State to fulfill this obligation. Brief at 46. Defendants are wrong.

Under Title IV-E's funding formula, Illinois receives over $65 million per year to fulfill its obligations under the Act, *Overview of Entitlement Programs* 797, in contrast to the mere $1.6 million provided in *Pennhurst*, 451 U.S. at 24. DCFS spends millions of these federal dollars on programs designed to provide services to children in their own homes. Illinois State Budget, Fiscal Year 1991 (1990) at 65, 66. Thus, it is disingenuous for defendants to contend that federal funding is not provided for this purpose.[24] In fact, Congress intended for

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[24] As the Secretary has noted, participating States are also reimbursed under other provisions of the Social Security Act for services provided to abused and neglected children and their families. 45 Fed. Reg. 86826 (1980). Illinois is entitled to 50% reimbursement

Illinois to use its Title IV-E funding to fulfill the requirements of the statute, including the exercise of reasonable efforts on behalf of children at home. *See* 42 U.S.C. § 670 (authorizing funding "to carry out the provisions of" Title IV-E).[25]

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for a wide range of in-home services under Title XIX, *Overview of Entitlement Programs*, 608, 610, including case management services, to help children and their families gain access to social services, 42 U.S.C. § 1396n(g)(2), and alcohol and drug treatment programs. 42 U.S.C. § 1396d(a). It also receives over $10 million annually to provide child welfare services—including family preservation services, 42 U.S.C. § 625(a)(1)(B), (C)—under Title IV-B. *Overview of Entitlement Programs* at 795.

These programs, as companion provisions in the Social Security Act, supply part of the context in which the reasonable efforts requirement must be construed. *Pennhurst*, 451 U.S. at 18. In particular, Title IV-B, like Title IV-E, demonstrates that the AACWA's purpose is to prevent States from placing children in foster care whenever possible. *See also* 48 Fed. Reg. 23104 (1983) (describing "prevention of unnecessary separation of the child from the parents," improved care and services, and reunification and other permanency planning as the "three pillars" on which the AACWA rests).

Unfortunately, defendants' discussion of Title IV-B is less than forthright. They attempt to mislead the Court by comparing Title IV-B funding for child welfare services to the annual budget for all of DCFS. Brief at 46 n.31. Even a cursory review of the DCFS budget shows that most of its funding is allocated to provide services for which Title IV-B permits no reimbursement. *Compare, e.g.*, 42 U.S.C. § 623(c)(1)(B) (prohibiting use of Title IV-B funding for foster care and adoption assistance) *with* 1990 Illinois Legislative Service 86-1142 (West) at § 9 (appropriating $200 million for out-of-home care and adoption assistance payments).

[25] Neither the "Payments to States" described in § 674 nor the declaration of purpose in § 670 bars the States from using Title IV-E money to provide preventive services. *Cf.* 42 U.S.C. § 677(b) (barring use of funding provided for AACWA's independent living programs for other purposes); 42 U.S.C. § 623(c)(1) (barring use of certain Title IV-B funding for employment-related day care, foster care, and adoption assistance). Neither contains the express conditional language required under *Pennhurst*. 451 U.S. at 23 ("when Congress intend[s] to impose conditions on the grant of federal funds . . . , it [is] capable of doing so in clear terms").

Defendants also suggest that in order to create a binding obligation, Congress must incorporate the requirement into the funding formula. They would thereby eliminate much of Congress' authority and political responsibility under the Spending Clause. For example, under defendants' approach, States could disregard their commitments under federal-state cooperative programs if Congress chose to fund them, even fully, with fixed dollar amounts. Not surprisingly, then, defendants cite no support for this proposition. Even if their argument had merit, Congress has fulfilled the requirement they propose. First, under the current funding formula, the AACWA pays States 50% of the cost of certain expenditures they make to keep children at home under 42 U.S.C. § 674(a)(3), including referrals to services designed to prevent the need for placing them in foster care. *See In re Missouri Department of Social Services*, HHS Grant Appeals Board, No. 85-209, Decision No. 844 (March 2, 1987) at 6-11. Second, Title IV-A, which also requires States to make reasonable efforts as a condition of federal funding, 42 U.S.C. § 602(a)(20), provides 50% reimbursement to Illinois for short-term emergency services provided to help children remain with their families. 45 C.F.R. § 233.120.[26]

Defendants also ignore the Secretary's construction of the Act and his role in its enforcement. The Secretary has interpreted § 671(a)(15) as requiring the States to make efforts to preserve families before placing children

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[26] In addition, defendants' suggestion may be inconsistent with their admissions that § 671 imposes other binding obligations on them. Defendants have tacitly conceded that the Act's case plan and case review requirements are mandatory and enforceable, despite the fact that under certain circumstances, defendants would receive no reimbursement whatsoever for fulfilling them. When Title IV-B funding rises to a specified level, the formula for determining Title IV-E funding disregards entirely the amount which a State currently spends on foster care and other expenses. 42 U.S.C. § 674(b). In such event, under defendants' view of the statute, participating States would not be bound by any of Title IV-E's requirements.

in foster care. Shortly after the Act's adoption, the Secretary stated:

> The required services must be available and accessible to all children and families in need, not just the IV-E child who by definition is already in foster care. Preventive services are intended to reach the child before he or she becomes a IV-E foster child, and therefore, must be available to all children in need.

45 Fed. Reg. 86823 (1980). *See also* 45 C.F.R. § 1356.21 (d)(4) (requiring participating States to provide services prior to removal of child and to include description of such services in case plan). The legislative history discussed above, *supra* at 15-17, simply reinforces the Secretary's conclusion. *See, e.g.*, 126 Cong. Rec. 14767 (June 13, 1980) (remarks of Sen. Cranston) (participating States "will be *required* to provide [home-based] services before removing the child and turning to foster care" (emphasis added)). Moreover, as with the reasonable efforts requirement generally, *supra* at 3, the Secretary is authorized to cut off funding if Illinois fails to implement a plan to make reasonable efforts to keep children at home, providing further evidence that § 671(a)(15)(A) imposes a binding obligation on Illinois. *Cf. Pennhurst*, 451 U.S. at 23.

The States' obligation to make reasonable efforts to preserve families is the key requirement of the AACWA. About this Congress left no room for doubt. *Id.* at 18. Defendants' comparison of the AACWA to the DDA is pointless. DCFS receives and spends substantial funding under Title IV-E, Title IV-A and companion provisions of the Social Security Act to provide in-home services to families. Thus, its promise to make reasonable efforts to enable children to remain with their families is a binding one.[27]

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[27] Defendants also decry the disparate treatment by the courts below of children at home under court supervision, on the one hand, and children with no Juvenile Court involvement, on the other. Brief at 48. Defendants themselves, however, agreed to this dis-

IV. UPHOLDING THE ENFORCEABILITY OF 42 U.S.C. § 671 WILL NOT CAUSE AN "AVALANCHE" OF FEDERAL CHILD WELFARE LITIGATION OR CREATE "DIFFERENT RIGHTS IN DIFFERENT STATES" BUT WILL PRESERVE A NECESSARY REMEDY TO ENSURE COMPLIANCE WITH THE AACWA.

Unable to present any legal basis for reversal, defendants and their amici ultimately resort to apocalyptic prophecies in an attempt to dissuade this Court from enforcing Congress' clear command in § 671(a)(15). These non-legal arguments fail defendants too.

A. Allowing Plaintiffs a Remedy for Systematic Violations of the AACWA Will Not Substantially Increase Child Welfare Litigation in the Federal Courts.

As discussed above, Congress gave participating States substantial discretion in implementing the reasonble efforts requirement, and federal courts must employ a deferential standard of review in assessing whether the State has complied with the Act. *Supra* at 24. As a result, plaintiffs alleging less clear-cut violations of the Act may be hard-pressed to invoke the authority of the federal courts in AACWA-related matters. In particular, a deferential standard of review will protect the States from unwarranted judicial scrutiny in cases where they have made some efforts, perhaps even the most minimal, to permit children to remain with or be returned to their families. By contrast, defendants' conduct here could not survive even deferential court review because defend-

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tinction. R. 7 at 1. Despite defendants' denials, DCFS sets children under court supervision apart from others by initiating court proceedings on their behalf. *See, e.g.*, Pl. Ex. 2, 1/17/89 Tr. at 34. Moreover, whatever distinctions were drawn by the District Court were rational in light of Illinois law. In Illinois, children are at immediate risk of permanent removal from their homes only when the Juvenile Court assumes jurisdiction over them. *See* Ill. Rev. Stat. ch. 37, ¶ 802-9(c) (barring State from assuming full custody of a child without court approval).

ants fail to have a plan in effect to make *any* efforts to maintain and reunite plaintiffs with their families.

Likewise, defendants' prediction of an avalanche of individual federal court challenges to isolated problems in specific cases also ignores the limits of the decisions below. Brief at 38-39. Plaintiffs here alleged systemic violations of the Act's reasonable efforts requirement. The District Court entered the preliminary injunction only after receiving extensive evidence that, despite the essential role of caseworkers in preserving and reuniting families, defendants failed to assign them to countless children and their families. In affirming the preliminary injunction, the Seventh Circuit, adopting the District Court's findings of fact, also focused exclusively on DCFS's systemic deficiencies. Pet. App. 11a-12a, 19a.

Plaintiffs alleging isolated problems in individual cases, by contrast, would regularly be barred from invoking the jurisdiction of federal courts by the doctrines of collateral estoppel, res judicata, and abstention. *See, e.g., Gardner v. Parson*, 874 F.2d 131, 142 (3d Cir. 1989) (AACWA-based family preservation claim collaterally estopped by finding in Family Court proceedings).[28] Con-

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[28] Defendants and the State of Louisiana, et al., cite *Norman v. Johnson*, 739 F. Supp. 1182 (N.D. Ill. 1990), to support their claim that other cases will be unaffected by abstention or collateral estoppel. Defendants' Brief at 38 n.23; Brief of Louisiana, et al., at 13. But DCFS's inability to present those arguments successfully in *Norman* is irrelevant here. The *Norman* court rejected DCFS's collateral estoppel arguments primarily because the reasonable efforts issue had not been litigated in Juvenile Court, 739 F. Supp. at 1189, which presumably would not be true in other cases. *See* S. Rep. No. 336 at 16 (rejecting suggestion that the state courts will disregard their obligations to make reasonable efforts determinations in individual cases). Likewise, the *Norman* court rejected DCFS's abstention arguments in part because the *Norman* plaintiffs' individual Juvenile Court cases were inactive, and in part because these cases could not address the systemic questions raised in *Norman*. 739 F. Supp. at 1190. Thus, *Norman* does not invite federal courts to second-guess Juvenile Court decisions in individual cases.

gress has also expressly required participating States to provide an administrative remedy for those who complain of isolated or individual problems. 42 U.S.C. § 671(a)(12) (requiring State to provide fair hearings for "any individual whose claim for benefits . . . is denied or is not acted upon with reasonable promptness" (emphasis added)). While insufficient to preclude a § 1983 remedy here, *supra* at 37-38, such federally-required administrative remedies may preclude § 1983 enforcement in individual cases. *See Patsy*, 457 U.S. at 502 n.4. Finally, defendants' floodgates argument is thoroughly refuted by the near-total absence of litigation under the AACWA's reasonable efforts requirement to date. Since 1980, only these plaintiffs and two of the named plaintiffs in *Norman* have obtained injunctive relief under § 671(a)(15). And of the cases defendants cite as evidence of the coming deluge, Pet. at 9, none involve mere individual challenges to caseworker decisions.

In short, there will be no avalanche, and no floodgates will open. The federal government generally, and the federal courts in particular, will retain only the limited role contemplated for them by Congress and accepted by Illinois. As Judge Cummings stated:

> The district court's injunctive relief does not . . . interfere with the ability of caseworkers to exercise their own professional judgment on the job. The court is not creating federally enforceable rights to beds, monetary assistance, or housing. The injunction merely fulfills the minimal requirement of the [AACWA] that reasonable efforts are made towards the goals of reducing unnecessary foster care placements and family disruption, and it does so through a method designed to maximize DCFS decision-making.

Pet. App. 16a-17a.

B. Federal Court Enforcement of the Reasonable Efforts Requirement Will Not Create "Different Rights in Different States" Or Undermine the Purposes of the AACWA.

Federal courts are obligated to tailor remedies to fit the particular circumstances of individual litigants. *See* Dobbs, *Handbook on the Law of Remedies* 54-55 (1973). Viewed in that light, the approach employed by the District Court and approved by the Court of Appeals was far from novel. The District Court first held that plaintiffs had an enforceable right to a state plan providing reasonable efforts in each of their cases—the same right that abused and neglected children have in other participating States. Pet. App. 11a. After finding that defendants had violated that right, the Court then simply crafted a remedy which was consistent with defendants' definition of the role of the caseworker in the DCFS system. *See, e.g.*, Pet. App. 55a, J.A. 48 at ¶ 37.

Defendants and their amici, however, criticize the decisions below as "creating different rights in different states." Defendants' Brief at 36; Louisiana Brief at 7-10. In addition to confusing right with remedy, *see* Dobbs, *supra*, at 3, this argument ignores the responsibility of federal courts to shape remedies to fit the parties before them. Federal statutes do not require blindly uniform remedial measures for them to be enforceable.

Defendants and other State amici also criticize the Court of Appeals' decision with the outlandish assertion that the decision will *discourage* the creation of new child welfare programs. Defendants' Brief at 39-40; Louisiana Brief at 10. This criticism reflects a fundamental misunderstanding of the proceedings below. The uncontroverted evidence showed that caseworkers are absolutely indispensable for Illinois to fulfill its obligation to children and their families under § 671(a)(15). Thus, unless a State itself concedes that a particular service is indispensable and then systematically fails to provide it, that

State will remain free, consistent with the Act's purpose, to expand and experiment with new child welfare services without fear of liability.

C. Denying the Enforceability of the Act Would Completely Eviscerate Its Family Preservation and Family Reunification Requirements and Leave Children Like the Plaintiffs with No Protection Against Unnecessary or Protracted Placement in Foster Care.

In *DeShaney v. Winnebago County Department of Social Services*, 109 S. Ct. 998 (1989), this Court confirmed that the scope of a State's affirmative duties to its citizens are set not by the Constitution, but by Congress and State legislatures. As the Court stated, "[t]he Framers were content to leave the extent of [affirmative] governmental obligation . . . to the democratic political processes." *Id.* at 1003. In this instance, Congress has established the scope of States' obligations through the AACWA. A product of the democratic political process, the AACWA requires participating States to provide certain aid to its citizens—namely, through their plans to make reasonable efforts to keep families together. Illinois has voluntarily accepted this obligation through its AACWA contract with the federal government. Therefore, this Court should enforce the statute as Congress intended.

Plaintiffs recognize that on occasion, federal courts have been reluctant to assume jurisdiction of cases involving private disputes *within* families. *See, e.g., Thompson v. Thompson*, 484 U.S. 174 (1988). Nevertheless, this Court has regularly protected families against unwarranted intervention by the State. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *see also Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (describing family as the paradigm of those relationships protected against unwarranted State intervention). The duty of courts is all the more clear when, as

here, Congress has provided children a statutory safeguard against unwarranted intrusions into family integrity by participating States.

This Court has also long recognized that it must, when the need arises, enforce social welfare legislation, even when the undertaking may be "highly complicated." As the Court in *Rosado* stated:

> It is . . . peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use.

397 U.S. at 422-23. Abused and neglected children deserve at least as much protection from this Court as plaintiffs in other social welfare cases. These children have no access to the legislative process, nor any adequate alternative remedies. They depend on this Court to enforce the unambiguous language of Congress, which requires Illinois to make reasonable efforts to maintain or reunite them with their families.

CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that the Court affirm the decision of the United States Court of Appeals for the Seventh Circuit.

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